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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1122

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK,

Petitioner,

v.

EAST BROOKLYN SAVINGS BANK (a/k/a METROPOLITAN SAVINGS BANK) and BREVOORT SAVINGS BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Did the Court of Appeals err when it unanimously affirmed a judgment of the District Court which dismissed petitioner's complaint alleging unfair competition and violations of the antitrust laws, where the District Court had found, at the conclusion of a full trial, that petitioner had failed to prove (i) wilful misappropriation, deception,

palming off or other predatory conduct on the part of respondents; (ii) that petitioner's name had acquired a secondary meaning; (iii) likelihood of confusion; or (iv) that respondents had violated any antitrust laws.

2. Do the decisions of the District Court and the Court of Appeals raise any novel questions of law or are they in conflict with prior decisions of this Court or other Courts of Appeals so as to justify the granting of a writ of certiorari?

Counter-Statement of the Case

The Plaintiff

Petitioner Metropolitan Federal Savings and Loan Association of New York (hereinafter referred to as the "plaintiff") has two offices both of which are located on Metropolitan Avenue in the County of Queens, New York City, within two miles of each other (A2).[1]

Plaintiff was organized in 1953 as a state-chartered savings and loan association under the name "Metropolitan Savings and Loan Association" (A1). The evidence at the trial showed that plaintiff adopted the name "Metropolitan" because of its location on Metropolitan Avenue (A2, Finding No. 9; 45a) and plaintiff's advertisements emphasize and describe it as a local neighborhood institution located on Metropolitan Avenue (A2, Finding No. 9; Def. Exs. C and D; 278a-279a).

In 1967, plaintiff converted to a federal savings and loan association and changed its name to Metropolitan Federal Savings and Loan Association of New York.

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[1] Numbers preceded by a capital "A" refer to pages in the appendix included as part of the Petition for Certiorari; numbers followed by a lower case "a" refer to pages in the Appendix filed in the Court of Appeals.

Plaintiff has approximately 13,000 depositors, of whom approximately 12,500 reside in the County of Queens with a majority residing within walking distance (defined by plaintiff's president as 10 blocks or less) of one of plaintiff's two offices (A2, Finding No. 4; 46a; 84a).

Plaintiff has an annual advertising budget of approximately $4,000 which is spent almost exclusively for direct mail advertising, addressed once a year to residents of Middle Village and Kew Gardens, Queens, the two local neighborhoods in which plaintiff's two offices are situated (A2, Finding No. 6; 24a; 246a). Plaintiff does no other advertising, with the exception of a single billboard located on Metropolitan Avenue, near its main office. The sign is rented by plaintiff at a cost of $100 per year (A2; Finding No. 5).

The defendant Metropolitan Savings Bank

Respondent East Brooklyn Savings Bank (a/k/a Metropolitan Savings Bank), hereinafter referred to as "defendant", was organized as a state-chartered savings bank in 1860 under the name "The East Brooklyn Savings Bank of the City of Brooklyn". In 1925 it became known as East Brooklyn Savings Bank (A3).

On November 15, 1968 defendant filed an application with the Superintendent of Banks of the State of New York for permission to change its name to "Metropolitan Savings Bank". Defendant's application to the Superintendent of Banks explained the purpose of the proposed change of name as follows:

> "The Board of Trustees believes that the proposed change of name will describe more accurately the geographic scope of the Bank's services than the present name . . ." (A3, Finding No. 12; Def. Ex. L; 291a)

Defendant's president, Mr. Walter Miller, testified that the name "Metropolitan Savings Bank" was selected (1) because the bank wished to adopt a less "localized" name and the name "Metropolitan" appeared to be more suitable, and (2) because Mr. Miller had learned that a proposed merger of two savings banks under the name "Metropolitan Savings Bank" had been dropped and he accordingly assumed that the name was available for use by his bank (165a-170a).

The evidence at the trial showed, and the trial court expressly found, that defendant Metropolitan Savings Bank was completely unaware of the existence of plaintiff Metropolitan Federal Savings and Loan Association of New York at the time it selected the name "Metropolitan Savings Bank" and at the time of its application to the Superintendent of Banks (A3, A7; Findings Nos. 13, 36; 172a).

Notice of defendant's application for a change of name was published in a weekly bulletin issued by the Banking Department of the State of New York on November 22, 1968 (A3, Finding No. 14). The application was opposed by the Manhattan Savings Bank on the grounds that one of its predecessors had previously used the name "Metropolitan Savings Bank". After due consideration, the Superintendent of Banks overruled the objection filed by the Manhattan Savings Bank and on August 7, 1969, authorized East Brooklyn Savings Bank to change its name to Metropolitan Savings Bank effective as of the close of business on September 30, 1969 (A3, A4).

The Superintendent of Banks reviewed defendant's application for permission to change its name to "Metropolitan Savings Bank" pursuant to § 9014 of the New York Banking Law which provides in pertinent part:

> ". . . the name of a corporation shall not be the same as the name of a corporation of any type or kind, as such name appears on the index of names of existing corporations of any type or kind in the banking department or a name so similar to such name as to tend to confuse or deceive." (A4)

The Superintendent's approval of the change of name was published in the weekly bulletin of the Banking Department of the State of New York on October 3, 1969 (A4, Finding No. 18). Thereafter, defendant Metropolitan Savings Bank expended approximately $15,000 to make physical changes in its signs, stationery and other printed matter and over $250,000 in advertising its new name (A5, Finding No. 20).

Plaintiff's objection to defendant's change of name

Plaintiff's first communication to defendant objecting to its use of the name Metropolitan Savings Bank was dated December 9, 1969 (Pl. Ex. 9, 193a)—more than a year after

defendant had filed its application for permission to change its name, four months after the Superintendent had published his approval of the change and more than two months after the change had become effective. When defendant rejected plaintiff's demand that defendant cease using the name "Metropolitan Savings Bank", plaintiff filed its complaint on January 6, 1970. Although the complaint demanded a "temporary injunction", plaintiff never moved for such relief.

The merger of defendant Metropolitan Savings Bank with defendant Brevoort Savings Bank

At the time of the trial, defendant Metropolitan Savings Bank had four offices, all of which were located in Brooklyn, with approximately 70,000 depositors and $227,000,000 in deposits (A6).

Defendant Brevoort Savings Bank was an institution with approximately $276,000,000 in deposits and 82,000 depositors. It had five offices, four of which were located in Brooklyn with the fifth located at 64-01 108th Street in Forest Hills, Queens (A5, A6).

The Forest Hills branch, which is the only one of defendants' offices situated in Queens, is located at a distance of several miles or over 40 blocks from either of plaintiff's two offices (283a). Plaintiff admitted that the Forest Hills office is not within convenient walking distance of plaintiff's offices (87a, 237a) and that a depositor in plaintiff's neighborhoods would have to use two buses and walk several blocks to get to defendant's Forest Hills branch (237a-238a). In addition, the Forest Hills branch is located in a neighborhood which is divided from plaintiff's two neighborhoods by the very formidable physical barrier of Queens Boulevard (A2, Finding No. 26, 241a, 283a).

In December 1969 the two defendants applied to the Superintendent of Banks for permission to merge under the name Metropolitan Savings Bank (A5, Finding No. 23).

On December 22, 1969, plaintiff filed an objection to the defendants' use of the name Metropolitan with the Superintendent of Banks. The plaintiff's attorney wrote a letter to the Superintendent of Banks dated December 22, 1969 stating:

> "The Metropolitan Federal Savings and Loan Association objects to that part of the merger plan which proposes to use the name Metropolitan as the name of the merged bank." (272a)

Notwithstanding plaintiff's objection, on March 6, 1970 the Superintendent of Banks granted permission to the two defendants to merge under the name Metropolitan Savings Bank effective on June 30, 1970 (312a).

The Superintendent of Banks made specific findings that the merger would have no significant anti-competitive effects (Def. Ex. V, 315a) and that it would be in the public interest (Def. Ex. V, 318a). The Superintendent found that the merged institution would rank 26th out of 46 savings banks headquartered in New York City (314a) and would hold only 1.5% of total deposits and slightly more than 2% of the total offices held by mutual thrift institutions in New York City (Def. Ex. V, 316a).

ARGUMENT

I

Petitioner has failed to demonstrate any special and important reasons for granting a writ of certiorari in this case.

After the conclusion of a full trial, at which plaintiff was afforded every opportunity to prove its case, the District Court expressly found that plaintiff had failed in every respect to prove its claims of unfair competition and violations of the antitrust laws. In rendering its decision the District Court applied well-settled principles of law in

concluding that the complaint had to be dismissed for failure of proof. The Court of Appeals affirmed unanimously and denied plaintiff's petition for a rehearing.

The decision in this case is not in conflict with the decision of another Court of Appeals; it does not present any important questions of federal law which should be settled by this Court; it does not involve a decision of a federal question in a way in conflict with applicable decisions of this Court; and it does not present any departure by the courts below from the accepted and usual course of judicial proceedings. Accordingly, the within Petition should be denied. See, U. S. Sup. Ct. Rule 19, 28 U.S.C.A.

A. The unfair competition claim

At the outset plaintiff argues that the courts below misinterpreted and misapplied the common law of unfair competition in a manner inconsistent with a prior decision of this Court. This argument is not correct for the following reasons:

The trial court held that in order to establish its claim of misappropriation of its name, the plaintiff had to prove either (1) that defendant was guilty of "one of the proscribed practices which equity will enjoin, i.e., palming off, actual deception, or appropriation of another's property" (A14), or (2) that plaintiff's name had acquired a secondary meaning (A13). In so holding, the court relied on the leading case of *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F. 2d 569, 571 (2d Cir. 1959), cert. den. 362 U. S. 919 (1960), where the Court of Appeals reviewed applicable principles of the law of unfair competition and made it clear that proof of secondary meaning will be dispensed with only where a defendant has engaged in "sharp or unethical business practices" (271 F. 2d at pp. 570-571). The Court of Appeals stated:

> "Hence, the first comer may prevail if he proves secondary meaning *plus* likelihood of confusion on the

one hand or that the second comer has indulged in one of the proscribed practices which equity will enjoin on the other." (271 F. 2d at p. 571) (Emphasis added)

The principles enunciated in *Norwich Pharmacal* and in the many cases which have followed it are entirely consistent with the decisions of this Court (including *International News Service* v. *Associated Press*, 248 U. S. 215 (1918), cited at page 11 of the Petition) and of other federal courts as well as the decisions of the New York courts. Plaintiff has failed to demonstrate that the case at bar raises any novel or important question of law which should be reviewed by this Court.

Plaintiff argues, however, that the principles of unfair competition, as followed by the District Court and Court of Appeals, are in conflict with the decision of this Court in *American Steel Foundries* v. *Robertson*, 269 U. S. 372 (1926).

The issue in that case was whether the Commissioner of Patents should register the word "Simplex" as a trade mark for articles made and sold by plaintiff American Steel Foundries over the objections of defendant Simplex Electric Heating Company which claimed that the word in question was the salient feature in its own name. This Court held such registration should be allowed.

Plaintiff quotes a few lines from the Court's opinion in that case (Petition p. 9), which are taken completely out of context, and then argues that this Court adopted the proposition that once a corporation has selected a name, that name may never be used by any other corporation under any circumstances.

Far from supporting the argument advanced by the plaintiff, the *American Steel Foundries* case is entirely consistent with the decisions below in the case at bar and with the precedents relied upon by the District Court.

In the *American Steel Foundries* case, this Court distinguished between a second use of a name which is completely identical in every respect with the name of an existing corporation, and a situation where less than the whole name has been used. The Court stated:

> "Where the appropriation of the corporate name is complete, the rule of the statute, by its own terms, is absolute and the proposed mark must be denied registration without more. But where less than the whole name has been appropriated, the right of registration will turn upon whether it appears that such partial appropriation is of such character and extent that, under the facts of the particular case, it is calculated to deceive or confuse the public to the injury of the corporation to which the name belongs." (269 U. S. at pp. 381-382)

The Court quoted with approval from another decision by the Commissioner admitting the word "Simplex" to registration:

> "'It is a fact that the word "Simplex" has been in such wide and varied use in this country not only as a trademark but as part of a firm or corporation name that everybody has heretofore considered something more than the word "Simplex" necessary to identify a corporation . . .
>
> "'. . . the word "Simplex" does not identify any corporation in particular, for the simple reason that it is equally the name of various corporations. In short, if one referred to "the company Simplex" without anything else, it would not be known to what he was referring. . . .
>
> "'The word involved in this case is one of a large class of words which have for a great many years been much used because of their peculiarly suggestive meaning. For other examples there are the words "Acme," "Anchor," "Champion," "Eureka," "Ex-

> relative," "Ideal," "Jewel," "Liberty," "National," "Pride," "Premier," "Queen," "Royal," "Star," "Sunlight," "Triumph," "Victor." It would be a serious matter if the law actually permitted anyone who chose to do so to organize a series of corporations with names containing these words, respectively, and thereupon virtually withdraw these words from public use as trade-marks and monopolize them by preventing their registry as such.'" (269 U. S. at pp. 383-384)

This Court then concluded that:

> "Under the facts, we are of opinion that it does not appear that the use of the word as a trade-mark upon the goods of the plaintiff will probably confuse or deceive the public to the injury of the defendant or of any other corporation. It follows that the refusal to allow the registration was erroneous." (269 U. S. at p. 384)

We submit that the word "Metropolitan" stands in the same category as the word "Simplex". Accordingly, applying the same reasoning to the case at bar, it follows that plaintiff has no right to monopolize the word "Metropolitan", especially in view of its total failure of proof on the issue of secondary meaning and likelihood of confusion. The District Court made express finding of fact that plaintiff failed to prove that its name had acquired secondary meaning (A7, Finding No. 33) or that there is any likelihood of confusion between defendant Metropolitan Savings Bank and plaintiff Metropolitan Federal Savings & Loan Association of New York or any abbreviation or variation of plaintiff's name (A7, Finding No. 35).

The decisions below are clearly not in conflict with the *American Steel Foundries* case but, on the contrary, are entirely consistent with the views of this Court, as expressed in that case.

Plaintiff also argues that the District Court misapplied the secondary meaning test, saying:

> "The trial court found that secondary meaning was established with respect to the name 'Metropolitan Federal Saving and Loan Association' but that without the word Federal in it there was no secondary meaning (A7; Finding of Fact 32). This was 'clearly erroneous' . . ." (Petition, p. 11)

Plaintiff misconstrues the finding of the District Court because the very next finding of fact states:

> "33. The plaintiff has failed to prove that the name 'Metropolitan', when used in connection with any name or title indicating a savings or savings and loan institution or savings bank, has acquired a secondary meaning so as to identify such name with the plaintiff's services." (A7)

And even if we assume that plaintiff's name had acquired some degree of secondary meaning, plaintiff failed to prove that there is any likelihood of confusion. The District Court expressly found:

> "35. Plaintiff has failed to prove that there is a likelihood of confusion between the name Metropolitan Savings Bank and the plaintiff's authorized name or any abbreviation or variation of the name plaintiff claims is generally used." (A7)

The District Court's finding is amply supported by the record and is certainly not "clearly erroneous".

Finally, plaintiff argues that defendants' use of the name "Metropolitan Savings Bank" constitutes a violation of the Home Owners Loan Act of 1933, 12 U.S.C. § 1461 *et seq.* and the regulations promulgated thereunder by the Federal Home Loan Bank Board.

Plaintiff's argument, which was never articulated in the courts below, appears to be that since plaintiff is chartered as a federal savings and loan association, its use of the name "Metropolitan" is sacrosanct and the name may not be used by any other banking institution regardless of general principles of the law of unfair competition.

However, there is nothing in the Act or in the regulations which lends the slightest support to such an argument. The statute merely states that the institutions shall "be known as 'Federal Savings and Loan Associations'", 12 U.S.C. § 1464(a) and the regulations, 12 C.F.R. § 543.1, provide that

> "The full corporate title of each Federal association shall include the words 'Federal Savings and Loan Association', which shall be preceded by a suitable descriptive word. . . ."

Surely this language cannot be construed to give plaintiff a monopoly in the use of the descriptive term "Metropolitan", absent any showing of willful misappropriation or secondary meaning and likelihood of confusion.

B. The antitrust claim

Plaintiff argues that it is a violation of the antitrust laws for the defendants to merge under the name Metropolitan Savings Bank. When plaintiff filed its objections to defendants' merger with the New York Superintendent of Banks, and again in the courts below, plaintiff repeatedly stressed that it was not objecting to the merger as such but only to the use of the name "Metropolitan Savings Bank" (294a and see also Petition for Certiorari, p. 15).

In dismissing the antitrust claim the District Court stated:

> "Plaintiff cites *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 83 S. Ct. 1715 (1963). *United*

States v. *First Nat'l Bank & Trust Co.*, 376 U. S. 665, 84 S. Ct. 1033 (1964), and *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 86 S. Ct. 1665 (1966) in support of its antitrust claim. It has failed, however, to offer anything close to sufficient evidence of the effect which the proposed merger of East Brooklyn and Brevoort under the corporate name Metropolitan can be expected to have on competition among savings banks. The antitrust claim must, therefore, be dismissed."

In addition the District Court made an express finding that:

"37. Plaintiff has failed to offer any evidence to support its claim of violation of 15 U.S.C. § 1 (Sherman Antitrust Act) and 15 U.S.C. § 18 (Clayton Act § 7)." (A8)

In the cases cited by the plaintiff, the Government had offered extensive proof relating to the number of banks in the areas involved and their relative sizes, income, market shares and other factors relating to the actual and threatened anticompetitive effect of the challenged mergers. The opinions of this Court contain lengthy and meticulous analyses of relevant market statistics in support of the Court's determinations that the mergers in question should be enjoined or set aside because of their anticompetitive effect.

In the case at bar, plaintiff has offered no proof at all that the merger between defendants Metropolitan Savings Bank and Brevoort Savings Bank will have any significant impact on competition in the relevant market, however that may be defined. The proof presented by defendants showed that the Superintendent of Banks, in approving the merger, found that the merged institution would hold only 1.5% of total deposits and slightly more than 2% of the

total offices held by mutual-thrift institutions in New York City (316a), that the merger would have no significant anti-competitive impact (315a) and that it would be in the public interest (318a).

In short, this case simply does not present an issue under the antitrust laws which would warrant a grant of certiorari.

II

The decisions below were in all respects correct.

Without attempting to present a full-fledged argument on the merits, since we are only opposing a Petition for Certiorari at this stage, we nevertheless feel that a brief discussion of the merits may be helpful to the Court.

A. The unfair competition claim

As we have already noted, the District Court found, after trial, that plaintiff had failed to prove wilful misappropriation, deception or palming off, secondary meaning or likelihood of confusion.

The District Court made the following findings of fact:

> "36. a) The defendant changed its name to Metropolitan Savings Bank and used the name since October 1, 1969 and was not aware of the existence or use of the plaintiff's name or the use of its claimed variations earlier than December 9, 1969.
>
> b) The adoption and use of such name was not with the intention by the defendant Metropolitan Savings Bank of palming off its services as the services of the plaintiff or trading on the name of the plaintiff or appropriating the name of the plaintiff.
>
> c) The defendant changed its named to Metropolitan Savings Bank and used the name Metropolitan

Savings Bank without any intent to deceive the public and the public has not been deceived."

Plaintiff offered no proof to the contrary but argued in its briefs that defendant was guilty of "gross recklessness" tantamount to wilful misconduct because defendant's officers did not examine the New York City telephone books.

The evidence showed that if defendant had looked at the Manhattan telephone book, which is the leading directory in the New York metropolitan area, it would have found the following listing:

"Metropolitan Federal Savings & Loan Assn
8 Foye Pl Jersey City NJ ..... NYC# 732-4768
Nights Sun & Holidays Tenafly NJ NYC# 565-5454
Nights Sun & Holidays Nw Hyd
Pk LI ..... NYC# FI 7-6854
Night Sun & Holidays ..... BO 1-8404"
(275a)

This however, is *not* plaintiff Metropolitan Federal Savings & Loan Association of New York. This Manhattan listing happens to refer to a completely unrelated federal savings and loan association located in Jersey City, New Jersey. Not only is plaintiff *not* listed in the Manhattan phone book but the listing described above is proof that plaintiff's name is not unique and has not acquired any secondary meaning in the New York metropolitan area associating it with plaintiff.

Defendant's president, Mr. Miller, testified that in selecting its new name defendant relied on the determination by the Superintendent of Banks under Sections 9014 and 9016 of the New York Banking Law that there was no impediment to the use of such name (171a-172a).

Sections 9014 and 9016 (A4) require the Superintendent to check out a proposed name against an index of existing

institutions maintained by the banking department in order to prevent the use of any new name which is so similar to an existing name as to tend to confuse or deceive.

A defendant certainly should not be found guilty of "gross recklessness" equal to "wilful misconduct" merely because it followed the procedures set forth in the New York Banking Law and relied on the search and determination made by the Superintendent of Banks.

The District Court also found:

> "33. The plaintiff has failed to prove that the name 'Metropolitan', when used in connection with any name or title indicating a savings or savings and loan institution or savings bank, has acquired a secondary meaning so as to identify such name with the plaintiff's services." (A7)

This finding is also amply supported by the record. The evidence showed that plaintiff does very little advertising so that it was in no position to argue that its name had been so heavily publicized as to have acquired a secondary meaning in the public mind. Although plaintiff tried to rely on unfair competition cases involving the Metropolitan Opera Company and the Metropolitan Life Insurance Company, plaintiff's position in the banking industry is in no way comparable to the positions of these organizations in their respective spheres of activity.

Plaintiff's only alleged proof of secondary meaning consisted of a showing that during a period selected by plaintiff (February-April 1970) some 135 out of over 2,000 mortgagors (or less than 7%) used abbreviations of plaintiff's name on their monthly payment checks (67a-69a; 123a-130a). Surely, the District Court was not clearly in error in finding that plaintiff had failed to prove that the public regards the name "Metropolitan" as associated with the banking services offered by this particular plaintiff.

On the question of confusion, the District Court made the following findings of fact:

> "34. Plaintiff has failed to prove actual confusion brought about by the use by the defendant of the name Metropolitan Savings Bank.
>
> "35. Plaintiff has failed to prove that there is a likelihood of confusion between the name Metropolitan Savings Bank and the plaintiff's authorized name or any abbreviation or variation of the name plaintiff claims is generally used." (29a)

These findings were not clearly erroneous. On the contrary, they were amply supported by the record.

Although defendant Metropolitan Savings Bank had been using its name since October 1, 1969, plaintiff was unable to offer proof of any actual confusion during the seven months preceding the trial, other than a few alleged conversations between plaintiff's President, Mr. Kraut, and unidentified strangers (89a) and an alleged telephone call from a credit investigator, who was not called as a witness and was not subject to cross-examination (90a). While proof of actual confusion is not an indispensable requirement in an unfair competition case, the presence or absence of such proof certainly bears upon the likelihood of future confusion where, as here, the allegedly infringing name has already been in use for some time.

All of the other evidence offered at the trial showed that there is no likelihood of confusion.

Mr. Kraut testified that plaintiff had selected the name "Metropolitan" because of plaintiff's location on Metropolitan Avenue (45a) and that the majority of plaintiff's depositors reside within walking distance (10 blocks or less) of one of plaintiff's two offices on Metropolitan Avenue (84a).

Indeed, Mr. Kraut stressed that:

> "The majority of depositors of *any* bank would reside in walking distance for convenience." (224a) (Emphasis added)

The evidence at the trial also showed that plaintiff's advertising places heavy emphasis on a "save in your own neighborhood" concept (see Def. Ex. "C" and "D", 278a and 279a).

The District Court found that none of defendants' offices were sufficiently close to plaintiff's two offices to create a likelihood of confusion; even with respect to defendant Brevoort Savings Bank's Queens office, which was the closest to plaintiff's two offices, the District Court found:

> "26. a) The Brevoort Savings Bank office in Forest Hills is located approximately 3 miles from the plaintiff's banking offices.
>
> b) The Brevoort Savings Bank office is in a community separate and apart from the banking offices of the plaintiff.
>
> c) Queens Boulevard effectively separates the communities in which the two banks are located. The plaintiff's banking offices are on the south side of Queens Boulevard separated from the communities on the north side of Queens Boulevard in which the Brevoort Savings Bank branch is located." (A6)

The District Court's findings and conclusions were not only in accord with the precedents of the federal Court of Appeals but are also consistent with New York cases dealing with unfair competition between similarly named banking institutions. *Yonkers Savings Bank* v. *Yonkers Savings and Loan Association*, 174 Misc. 973 (Sup. Ct. Westchester Co. 1940) *aff'd* 262 App. Div. 755 (2d Dept.

1940); *New York Trust Company* v. *New York County Trust Company*, 125 Misc. 735 (Sup. Ct. N. Y. Co. 1925) *aff'd* 215 App. Div. 699 (1st Dept. 1925). In both of these cases the courts refused to enjoin the use of similar names despite proof, unlike here, that there had been some actual confusion.

Defendants also asked the District Court to accord some weight to the administrative expertise of the New York Superintendent of Banks, who had approved defendants' use of the name "Metropolitan Savings Bank" after complying with Section 9014 of the New York Banking Law which requires the banking department to check the index of names of existing corporations to avoid the use of a name so similar "as to tend to confuse or deceive" (A4). The District Court made several findings of fact relating to the action taken by the Superintendent (A3-A5, Finding Nos. 11 through 19, 23 and 24) but it did not predicate its decision to dismiss the complaint on the Superintendent's determination. It made its own findings and conclusions and dismissed the complaint because plaintiff had failed to prove any of the elements of an unfair competition claim.

B. The antitrust claim

With respect to the antitrust claims we can only repeat what is said at pages 13-15 of this brief. There was simply not a shred of evidence to support plaintiff's allegations, and the District Court was clearly justified in dismissing the complaint after trial.

Conclusion

Plaintiff has failed to raise any question which is of sufficient novelty or importance to warrant review by this Court.

This is simply a case of a plaintiff which made certain allegations and was unable to prove them at trial.

The District Court applied correct principles of law and made findings of fact which were not clearly erroneous but were amply suported by the record. The Court of Appeals did not err in unanimously affirming the judgment of the trial court and denying a petition for rehearing.

The petition for certiorari should, accordingly, be denied.

Respectfully submitted,

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